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Acquisition Research Program

Acquisition Research Program Need to Know Newsletter

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2021-04-30

## NPS Need to Know Newsletter Acquisition Research Program, 2021-04-30

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# NEED TO KNOW

April 30, 2021

Issue 53

Leadership positions at DoD are filling out with nominations (Kendall, Ortiz, and Shyu) and a confirmation (Colin Kahl). The trend of putting experienced acquisition leaders in broader leadership positions continues. We're proud to note that both Kendall and Shyu have given keynote addresses at past symposiums. Speaking of a busy Congressional schedule, it seems increasingly likely that the full budget request will be delayed for a while. NDAA markup is now scheduled for July, two months later than normal. Odds are we're starting FY2022 with a continuing resolution. In acquisition news, our top story tells the sad tale of JEDI—the cloud computing contract that couldn't. Several articles describe some exciting progress with acquisition innovation—from using commercial solution openings for services to the push to make covid-era expedited acquisitions the norm rather than the exception.

The symposium is less than two weeks away, and we are breaking records—nearly 700 people have registered. Each webinar session is limited to 500 people, so set your calendar reminders! We'll be posting on Twitter and LinkedIn during the event, and we encourage you to join the conversation by using #AcqnSymposium. See below for a preview of the Day 1 lineup.

## **This Week's Top Story**

### **The JEDI saga continues: Court denies motion to dismiss AWS protest of political interference**

Billy Mitchell, FedScoop

The Court of Federal Claims issued a sealed decision Wednesday denying a motion by the Department of Justice and Microsoft to dismiss Amazon's protest of the Pentagon's \$10 billion Joint Enterprise Defense Infrastructure (JEDI) cloud contract.

While the decision to dismiss wasn't made available to the public, Amazon confirmed the court's denial.

Amazon has two main claims in its larger JEDI protest of Microsoft's award: That "DOD consistently and repeatedly made prejudicial errors, at every step along the way, that systematically favored Microsoft," and that this happened because of overt influence from President Trump and other high-level government officials, who wanted to do harm to Amazon.

There's a very real possibility the Department of Defense could now decide to give up on this program. The DOD has been working to get the JEDI contract awarded and operational for the better part of four years now.

In January, acting DOD CIO John Sherman told FedScoop: "Regardless of the JEDI Cloud litigation outcome, the Department continues to have an urgent, unmet requirement for enterprise-wide, commercial cloud services for all three classification levels that also works at

the tactical edge, on scale. We remain fully committed to meeting this requirement—we hope through JEDI—but this requirement transcends any one procurement, and we will be prepared to ensure it is met one way or another.

[Read more.](#)

## **ARP and NPS News**

### **18<sup>th</sup> Annual Acquisition Research Symposium**

May 11-13, 2021

Day 1 kicks off with a keynote address from Ms. Stacy Cummings, followed by a plenary panel on “Implications of the Next Administration for Defense Acquisition,” with chair Todd Harrison and panelists Elaine McCusker, Peter Levine, and David Berteau. The day continues with six more panels and concludes with a virtual student poster show, where attendees can come on screen to directly ask questions and engage with these scholar-practitioners.

Full program is available online. Links to webinar sessions will be posted on the private program page—you'll need to sign in to get access. Keep your password handy!

### **Naval Warfare Studies Institute: Innovation through Collaboration**

Joshua O'Day, Georgetown Security Studies Review

The Naval Postgraduate School (NPS), an institution that has worked to solve complex national security problems since its inception, took another step towards helping the U.S. maintain a military advantage by founding the Wayne P. Hughes Jr. Naval Warfare Studies Institute (NWSI) in December 2020. NWSI is uniquely designed to address current and future national security issues by building relationships between six key stakeholder groups: the Naval Education Enterprise, the Naval Research and Development Establishment, the Service headquarters and supporting establishment, industry, academia, and the Sailors and Marines of the Fleet/Fleet Marine Force.

### **Dr. Charles Pickar's article “[Getting to a Win](#)” named Editors' Pick for Runner Up in the Best Commentary category of the ALTies Awards**

The ALTies celebrate the best of Army AL&T—the best article, commentary, graphic and photograph that appeared in print or website issues in 2020. The list of nominees was long and impressive, and standing out among an already elite group is a noteworthy accomplishment.

## **Events**

### **The Biden Administration's First 100 Days in Review**

with Deputy Secretary of Defense Kathleen Hicks, National Security Advisor Jake Sullivan, former Deputy Secretary of State Steve Biegun, and Chairman of BlackRock Investment Institute and former National Security Advisor Tom Donilon

## **Acquisition and Innovation**

### **[COVID-19 successes set new expectations for federal acquisition community](#)**

Jared Serbu, Federal News Network

### **[Hawley bill would spotlight Chinese electronics in defense systems](#)**

Joe Gould, Defense News

### **[DOD to Flex CSO Fast-Track Buying Powers for Consulting Services](#)**

Chris Cornillie, Bloomberg Government

### **[Kessel Run Reaches AOC WS Modernization Milestone](#)**

Press Release

### **[Biden Nominee for Pentagon Weapons Buyer Under Investigation](#)**

Tara Copp, Defense One

### **[DHS launching a CDO office and CMMC-like risk management program](#)**

Dave Nyczepir, FedScoop

## **Research**

### **[Emerging Technologies and Acquisition](#)**

ACT-IAC

### **[DOD Science and Technology Executive Committee Announces Winner of FY21 Applied Research for Advancement of S&T Priorities Program Award](#)**

DoD Press Release

### **[Resources for Tracking Federal COVID-19 Spending](#)**

Congressional Research Service

### **[Audit of Other Transactions Awarded Through Consortiums](#)**

Department of Defense Inspector General

## **Congress**

### **[Biden budget delay blows up Hill defense schedule](#)**

Leo Shane III and Joe Gould, Defense News

### **[Biden's Pentagon policy chief Colin Kahl confirmed with GOP senators absent](#)**

Joe Gould, Defense News

### **[Watch: Department of Defense's management challenges and opportunities with testimony from Peter Levine, Adam Grant, and Elizabeth Field](#)**

Senate Armed Services Committee

**[Watch: Defense acquisition programs and acquisition reform with Stacy Cummings, Raymond O'Toole, and Shelby Oakley](#)**

Senate Armed Services Committee

## **Defense and Federal Government**

**[Frank Kendall Nominated as 26th Secretary of the Air Force](#)**

John A. Tirpak, Air Force Magazine

**[Navy Chief Aiming for 355-Ship Fleet Despite Calls for Larger Force](#)**

Jon Harper, National Defense Magazine

**[Biden picks Shyu for DoD research and engineering chief](#)**

Joe Gould and Aaron Mehta, Defense News

**[Pentagon now using direct-hire authorities for a third of its cyber workforce](#)**

Jared Serbu, Federal News Network

**[The world spent almost \\$2 trillion on defense in 2020](#)**

Aaron Mehta, Defense News

## **Acquisition Tips and Tools, with Larry Asch**

### **What is Highest Technically Rated with Fair and Reasonable Price?**

A friend of mine is putting together a Multiple Award IDIQ strategy and asked what I thought about using the Highest Technically Rated with Fair and Reasonable Price source selection evaluation scheme. I told him I had no experience with this evaluation scheme. This piqued my curiosity, and the following is the information my research uncovered.

In January 2017, the Government Accountability Office (GAO) issued a [protest decision](#) finding that the Federal Acquisition Regulation (FAR) permits agencies to use a source selection scheme that provides for award to proposals receiving the highest technical rating with fair and reasonable prices. This evaluation scheme was used by General Services Administration (GSA) as a multiple award, indefinite quantity set of contracts for information technology services. The RFP provided that GSA would select 60 awardees using a "highest technically rated with a fair and reasonable price" evaluation scheme. GSA would first rank all offerors from highest to lowest point scores, verify the scores, then identify the top 60 firms and analyze the pricing of those 60 proposals for fairness and reasonableness. The solicitation stated that any offer that lacked a fair and reasonable price would be eliminated, and there would be no tradeoff between the non-price factors and price.

The protester primarily protested the evaluation scheme, asserting that the scheme violated the Competition in Contracting Act, 41 U.S.C. § 3306(c)(1)(B), which states that "cost or price...must be considered in the evaluation of proposals. The protester stated that a determination that a price is "fair and reasonable" does not constitute a meaningful consideration of price.

The GAO began by pointing to FAR 1.102(d) which states that agencies "may assume if a specific strategy, practice, policy or procedure is in the best interest of the government and is

not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.” The GAO further noted that besides a tradeoff, FAR 15.101 envisions at least two other source selection processes: “lower price offeror” and a process that results in award to the “highest technically rated offeror.” GAO concluded that there was no basis in the FAR to object to a source selection process that contemplated award to the highest technically rated offerors without using a tradeoff process.

Next, the GAO addressed the need to consider price. GAO noted that in a tradeoff process, the agency cannot so minimize the impact of price as to make it a “nominal evaluation factor.” However, this solicitation involved no comparison of an offeror’s price relative to the benefits of its proposal. GAO concluded that here, the “relatively low importance of price in an evaluation scheme that does not contemplate tradeoffs” was unobjectionable. Further, because the selection process considered the price of every awardee and rejected those firms that lacked fair and reasonable pricing, GSA has satisfied the requirement to consider price to the government.

GAO’s ruling was consistent with an earlier Court of Federal Claims ruling in *Octo Consulting Group, Inc. v. United States*, 117 Fed Cl. 334 (2014). There, the protester challenged the award of GSA’s One Acquisition Solution for Integration Service-Small Business (OASIS). The solicitation appeared to be very similar and stated that “The best value basis for awards will be determined by the Highest Technically Rated Offerors with a Fair and Reasonable Price.”

After my research above I spoke to some smart people to get experiences and seek out policy and guidance documents, especially in DoD. My research did not come up with any in policy or guidance documents in DoD. Some of my network had used it for Multiple Award base IDIQs under FAR Part 15. They had implemented the evaluation scheme using an Objective Self Scoring Point-System and had used it because they thought GSA had been innovative, and it was a good process to meet the CICA requirement to evaluate price under the Multiple Award base IDIQ. I also found other GAO Protest cases that supported the 2017 GAO decision.

Some Takeaways:

- We commend GAO for supporting FAR 1.102(d) “may assume if a specific strategy, practice, policy or procedure is in the best interest of the government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.” This type of support should give rise to innovation and risk-taking.
- GSA created a source selection scheme that focused on an objective point system and smart way to evaluate pricing. This objective scoring-system requires meaningful thought on critical aspects tied to performance. This moves the price competition to the task order level where each agency will assess whether the prices are a good value.
- Thanks to early adopters who see a good idea and move out to innovate.

Before the source selection subjective evaluation police inform us that this will require a Waiver of the DoD Source Selection Guide and other reasons we can’t do it, providing some valuable information to our folks would help:

- Best practices and lessons learned for Self-Scoring Point system

- When the Highest Technically Rated with Fair and Reasonable Price would be effective i.e., Multiple Award base IDIQ especially when maximum interest from industry
- If an acquisition uses Objective Self-Scoring system the approval of the Acquisition Strategy is all needed and no other waivers are required
- Add to the much-needed new DoD Source Selection Guide a section on these areas as well as others we have discussed in previous Tips & Tools e.g., Use of Oral Proposals and Presentations, How to select true discriminators, and preventing Race to the Bottom through Price Ranges
- AND most important leadership sharing some of the different techniques being used in the field and teach us how and when to use them.